Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1978

No. 78-543

KERMIT FRAZIER, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit

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United States v. New South Farm and Home Company, 241 U.S. 64 (1916) 6

United States v. Regent Office Supply Co., 421 F. 2d 1174 (2d Cir. 1970) 5

Statutes Cited

18 U.S.C. § 1341 (1976) 2, 3, 4, 5, 7

19 U.S.C. § 1341 5

28 U.S.C. § 1254(1) 2

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To the United States Court of Appeals for the Sixth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on August 1, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is appended hereto as Exhibit A.

JURISDICTION

Petitioner was tried and convicted on an indictment in the United States District Court for the Eastern District of Ten-

nessee charging violation of 18 U.S.C. § 1341 (1976) the mail fraud statute. Petitioner presented eight issues on appeal, contesting the sufficiency of the evidence and various rulings and instructions by the trial judge. The United States Court of Appeals for the Sixth Circuit remanded for a new trial on the basis of certain prejudicial statements made by the trial judge to petitioner's counsel. However, the Court of Appeals rejected petitioner's arguments based upon the inapplicability of the mail fraud statute and the insufficiency of the evidence. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to seek review of Petitioner's contention that the allegations and evidence were not such as to warrant prosecution under 18 U.S.C. § 1341. The decision of the Court of Appeals was filed on August 1, 1978 and on August 23, 1978 this Court entered its order extending the time for filing this writ to and including September 30, 1978 (Appendix A-2).

QUESTION PRESENTED

Whether the obtaining of falsified drivers licenses through the mail constitutes a scheme to defraud by use of the mails and as such is properly prosecuted under 18 U.S.C. § 1341.

STATUTE INVOLVED

Title 18 United States Code, Section 1341.

STATEMENT

Petitioner, Kermit Frazier and two co-defendants were charged with devising a scheme to obtain motor vehicle operator licenses through the mail by means of false and fraudulent representations. They were accused of obtaining Tennessee drivers licenses during the period January 20 through November 19, 1976. The

indictment alleged that these licenses were obtained by submitting false applications to the Tennessee Department of Public Safety in Nashville. Frazier's alleged participation in the scheme was that he provided names and physical descriptions of persons to whom the drivers licenses were to be issued. Frazier was also charged with arranging with his sisters to rent post office boxes for the purpose of receiving the drivers licenses.

Petitioner moved to dismiss the indictment in that it did not state an offense under 18 U.S.C. § 1341 for mail fraud since the indictment did not allege any depravation of a business or property interest. Appellant also moved for severance from his co-defendants. Both motions were denied.

During counsel for Petitioner's opening statement, the Court pressed counsel for an opinion of his client's guilt. Petitioner then moved for a mistrial and was overruled. (The Court's action in this regard was the basis of the reversal by the Court of Appeals and is not an issue in this petition.)

The Government introduced twenty drivers license applications allegedly issued as a result of false and fraudulent misrepresentations, some of which showed addresses at the post office boxes rented by Petitioner's sisters. A deputy was called to testify that he had been unable to find any of these people, but all of the investigation had been done in one day. The sisters testified that they had been asked to rent the boxes for friends of their brother as a favor. There was testimony that it was a common practice for more than one person to use a post office box.

Another address alleged to be a conduit for the licenses was not adequately connected to Petitioner and testimony was given showing that the house at that address belonged to an unrelated party. Evidence was adduced showing a number of phone calls between Petitioner's home and one of the co-defendant's

office and home, but there was no showing of the content or number of actual communications. The co-defendant stated that he was involved in the sale of cattle to Petitioner.

At the conclusion of the Government's case, Petitioner's attorney moved for judgment of acquittal, renewed his motion for severance and moved that the case be submitted to the jury as to Petitioner at that point. All of these motions were denied. Petitioner presented no evidence, took no part in any cross-examination of his co-defendant's witnesses. All three defendants were found guilty of mail fraud in violation of 18 U.S.C. §1341.

The decision of the trial court was remanded for a new trial by the United States Court of Appeals for the Sixth Circuit based upon their finding that the comments made by the trial judge to Petitioner's attorney during his opening statement had been extremely prejudicial. However the Court of Appeals rejected Appellant's argument that the mail fraud statute was inapplicable to the factual situation alleged or proven.

REASONS FOR GRANTING THE WRIT

1. This Court Should Take the Opportunity This Case Affords to Give Greater Definition to the Scope of Cases Contemplated for Prosecution Under 19 U.S.C. §1341.

This Court has never before specifically addressed the question of whether the mail fraud statute was intended to apply solely to the area of commercial fraud or whether it is also applicable to schemes to defraud a governmental body. Lower courts have addressed this problem. In *United States v. Henderson*, 386 F.Supp. 1048 (S.D.N.Y. 1974) defendant was indicted for a violation of the mail fraud statute by devising a scheme to defraud the United States in an attempt to evade payment of taxes. The Court found that Congress did not intend the mail fraud statute to apply to schemes to wade payment of federal income taxes stating that the mail fraud statute generally applies in cases "designed to defraud members of the community at large, in the sale of commodities and services, rather than schemes to defraud the government, as is involved in this case."

It would appear that the primary problem with the applicability of 18 U.S.C. §1341 to cases involving misrepresentations to a governmental body is the difficulty to proving an intent to defraud or exactly what harm would result to that governmental body. In the normal commercial fraud case, it is clear that the Government bears the burden of proving either that some injury actually occurred or what form of injury was intended to occur. See *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), where the Court of Appeals found that false representations made by the defendants did not concern the price or quality of stationery supplies offered for sale but rather concerned the inducement to buy. The buyers received the equivalent value of what they paid for; consequently, there was no injury and therefore, no violation of the

mail fraud statute. In further support of this point is *Harrison v. United States*, 200 F.2d 662, 666 (6th Cir. 1912), where the basis for the court's reversal was that the evidence was insufficient to show a scheme wherein the defendants received money "for nothing".

In the instant case, the State of Tennessee received the proper fees for its licenses so obviously there was no intent to defraud the State in any monetary sense. There are, in fact, no allegations or proof that the defendant intended to defraud the State of *any* interest, monetary or otherwise. The State has no discernable interest in this situation except the receipt of a fee in exchange for a permit to use its highways. With regard to misrepresentations on drivers license applications the State can and in fact does protect its interests without the need for federal intervention.

The inability to identify what property interest is being injured in this instance is the crux of the problem. Where an individual is being deliberately misled into relinquishing money or some other item of value in exchange for something of little or no worth, there is a clear cut interest to protect. This can be seen in such cases as *Donaldson, Postmaster General v. Real Magazine, Inc.*, 333 U.S. 178 (1948); *United States v. Ballard*, 322 U.S. 78 (1944); *United States v. New South Farm and Home Company*, 241 U.S. 64 (1916). All of these cases involved sales tactics or false representations which misled purchasers as to the quality or effectiveness of the goods they were buying, or misled them with regard to the benefits they would receive by entering into certain contests, joining an organization, or participating in a "bargain deal". All of this affirms the concept that fraud means the intent to receive something for nothing. If *Henderson*, 386 F. Supp. at 1053, a situation where there was evasion of taxes, i.e. defrauding the government of money, is not an applicable situation for the mail fraud statute, then surely when the government has been defrauded

of no apparent interest at all there is nothing which 18 U.S.C. §1341 can control.

The first element necessary to prove a mail fraud case as just discussed dealt solely with the intent to defraud, and the interests thereby injured the second deals with the use of the mails to further the scheme to defraud. Here again, the Government has gone outside of the purpose of the mail fraud statute. Petitioner was never specifically connected with causing the allegedly falsified documents to be mailed. The only evidence which showed an association between Petitioner and the plan to use the mails to receive falsified drivers licenses was that Frazier asked his two sisters, Ruby Presnell and Annette Coldwell, to permit friends of Frazier to share the post office boxes obtained by the two ladies, one in the name of Mrs. Presnell and the other for a John David McMahan and that several licenses qeustioned by the Government were addressed to those box numbers. In order to prove that Petitioner had an intent to use the mails to defraud the Government would have had to show that he knew of the alleged falsity of the statements made on applications or licenses received at those boxes *and* caused them to be mailed. What actually was proved was Petitioner's connection with the renting of post office boxes. This leads again to the question of intent, and central to the concept of specific intent to defraud is the requirement that the accused must have had knowledge that the representations he made were false and that he knowingly and intentionally participated in the fraudulent scheme. *Pritchard v. United States*, 386 F.2d 760 (8th Cir. 1967), *cert. denied sub nom. Borchett v. United States*, 390 U.S. 2004 (1969). It is clear that there was no evidence showing Frazier's knowledge of the alleged falsity of any person registered to receive mail at the boxes rented by his sisters or of the alleged falsity of any statements made concerning mail received at those boxes. The nature of the allegations and proof were such as to suggest no form of injury to any state interest which the government could identify and no connection between petitioner and any falsified statements or documents based upon such falsified statements.

CONCLUSION

For the foregoing reasons, this Court should issue its writ of certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. A-205

Kermit Frazier, Jr.,

Petitioner,

v.

United States

Order Extending Time to File Petition for

Writ of Certiorari

Upon consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 30, 1978.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 23rd day of August, 1978

APPENDIX B

No. 77-5242

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
Kermit Frazier, Jr.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided and Filed August 1, 1978

Before: Edwards and Keith, Circuit Judges, and Rubin,* District Judge.

Edwards, Circuit Judge. After a lengthy trial, appellant Frazier was convicted on a federal indictment charging violation of 18 U.S.C. § 1341 (1976)—the mail fraud statute.[1]

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* Honorable Carl B. Rubin, United States District Judge for the Southern District of Ohio, sitting by designation.

1 Whoever, having devised or intending to devise any scheme or artifice to defraud . . ., for the purpose of executing such scheme or artifice or attempting to do so places in any post office or authorized depositor for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing shall be fined not more than $1,000 or imprisoned not more than 5 years, or both.

18 U.S.C. § 1341 (1976).

The government's proofs were such as to present evidence from which the jury could have found (as it did) that Frazier had participated in a scheme to procure the issuance of Tennessee drivers' licenses by the Nashville office of the Tennessee Department of Public Safety through the use of mailings of false applications and the sending of licenses through the mails to fictitious addresses. Two public employees (appellant was not one of these) were shown by the evidence to have been involved in the scheme which operated successfully for ten months in 1976.

Appellant presents eight appellate issues contesting the sufficiency of the evidence and various rulings and instructions by the trial judge. Our inspection of this record convinces us that this was, except for one episode, a generally fair trial in which government proofs were presented against appellant which, albeit not overwhelming, were sufficient to support the jury verdict.

The one exception, however, came at the very beginning of the trial. It involved the authority of the trial judge. It could have prejudiced the jury's attitude toward the appellant from the beginning of the trial in a manner which we cannot on this record regard as "harmless." *See* FED. R. CRIM. P. 52 (a).

During appellant's counsel's opening statement, the following colloquy took place:

> MR. FLEMING: Ladies and Gentlemen of the Jury, I represent Mr. Rusty Frazier, the young man sitting there, the young man from Newport, Tennessee.
>
> Likewise, Mr. Frazier has pleaded not guilty to the offense of mail fraud. It is his position that if there were any false statement made, any improper information furnished, he did not intentionally participate in furnishing any type of false information; did not intentionally cause anyone or any person to be misled or defrauded.

He has pleaded not guilty. We do not believe the government is going to show——

THE COURT: *Now, did he cause any of these licenses to be issued?*

MR. FLEMING: He pleads not guilty, your Honor.

THE COURT: *Well, I am asking you if he did, if he caused any of these to be issued.*

MR. FLEMING: It is his position that he did not intentionally do any act that was misleading.

THE COURT: Well, all right. *You haven't answered my question. You dodged my question,* but you may not know whether or not he issued any of these licenses.

MR. FLEMING: He certainly didn't issue any of the licenses, your Honor. He did not work in the license bureau.

THE COURT: Did he cause any of them to be issued?

MR. FLEMING: Your Honor, no, he says he did not.

THE COURT: All right, then that ends it, if that is what he says.

At the first break in the trial, when the jury was removed from the courtroom, appellant's counsel sought a mistrial and the following exchange between court and counsel took place:

MR. FLEMING: And one final point, your Honor. I feel that, with all due respect to the Court, I am going to have to move for a mistrial based on the Court's comment during my opening argument.

THE COURT: You can make your motion, but sit down. That's all. Your motion is overruled. Overruled, such stuff as that, I don't want much of that in this trial, you hear?

MR. FLEMING: I understand, your Honor, that is why I am doing it out of the presence of the jury.

It is impossible for us to see how the jury could have construed the judge's two questions and the following comment during counsel's opening statement (italicized above) as anything other than a demand by the court that counsel certify to his client's innocence. The questions went to the heart of the government's indictment against appellant. Counsel was placed in an impossible dilemma. Communications between a client and his counsel are, of course, privileged. FED. R. EVID. 501. *See Fisher v. United States,* 425 U.S. 391, 403 (1975).

Basically the client is holder of the privilege. MCCORMICK, EVIDENCE § 92 (2d ed. 1972). It is also true that the attorney has no right to waive the privilege and only the client can waive it. MCCORMICK, EVIDENCE § 93 (2d ed. 1972). Legal ethics prohibit a lawyer from revealing information which his client has given him in confidence:

DR 4-101 Preservation of Confidence and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disclipinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101.

Additionally, the trial judge has a duty to respect and enforce the attorney-client privilege:

5.8 Duty of judge to respect attorney-client relationship.

The trial judge should respect the obligation of counsel to refrain from speaking on privileged matters and should avoid putting him in a position where his ad-

herence to the obligation, such as by a refusal to answer, may tend to prejudice his client. Unless the privilege is waived, the trial judge should not request counsel to comment on evidence or other matters where his knowledge is likely to be gained from privileged communications.

ABA STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 5.8 (Approved Draft 1972).

Over and above all of the foregoing, there is a rule against counsel asserting his personal beliefs:

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

* * *

(4) Assert his personal opinions as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(C)(4).

(b) It is unprofessional conduct for a lawyer to express his personal belief or opinion in his client's innocence or his personal belief or opinion in the truth or falsity of any testimony or evidence, or to attribute the crime to another person unless such an inference is warranted by the evidence.

ABA STANDARDS RELATING TO THE DEFENSE FUNCTION § 7.8(b) (Approved Draft 1971).

See United States v. Leon, 534 F.2d 667 (6th Cir. 1976); *United States v. Daniels*, 528 F.2d 705, 709 (6th Cir. 1975).

Additionally, the trial judge has a duty to enforce this ethical obligation:

> The trial judge should not permit counsel during the closing argument to the jury to
>
> > (i) express his personal opinions as to the truth or falsity of any testimony or evidence or the guilt or innocence of the defendant, . . .
>
> ABA STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 5.10(i) (Approved Draft 1972).

We are well aware that the trial judge is one of the best and most conscientious in this nation. We are confident that he intended no such impact from his words as we have described. We also recognize that there may have been circumstances known to the judge but not in this record which might help to explain the colloquy we have quoted. Nonetheless, we are controlled in appellate review by the record presented. The two underlined questions and the judicial comment, "you have dodged my question," when the matter was privileged and counsel was under an ethical duty not to answer it in the presence of the jury, constitute prejudicial error which we cannot deem harmless under the facts of this case.

The judgment of conviction is vacated and the case is remanded for a new trial.